Supreme Court, U.S.
FILED
MAR 25 2002
OFFICE OF THE CLERK

No. 01-1423

In The

Supreme Court of the United States

SPENCER WADDELL,

Petitioner,

v.

VALLEY FORGE DENTAL ASSOCIATES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari where the Court of Appeals properly applied the teachings of *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), and *Bragdon v. Abbott*, 524 U.S. 624 (1998), in this specific factual context and held that an HIV-positive dental hygienist was a direct threat to his patients because the evidence confirmed that he would have exposed his unsuspecting patients to a significant risk of contracting a fatal disease on a daily basis.

2. Whether this Court should grant certiorari on petitioner's claim that the Court of Appeals erred in requiring petitioner to bear the burden of proving that he was not a direct threat to his patients when petitioner never presented or preserved that issue in the lower courts and the lower courts' decisions were not based on the placement of the burden of proof in any event.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

The parties to this proceeding are Spencer Waddell, Petitioner, and Valley Forge Dental Associates, Inc., Respondent.

Monarch Dental Corporation is the parent company of Valley Forge Dental Associates, and is Valley Forge's successor-in-interest.

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STATEMENT OF THE CASE

A. Petitioner's Employment

This case arises from petitioner Spencer Waddell's separation from his employment at the dental practice of Dr. Eugene Witkin, after Dr. Witkin determined that petitioner's HIV-positive status rendered him a direct threat to the health and safety of the thousands of unsuspecting adult and child patients he treated. Petitioner worked as a dental hygienist for Dr. Witkin intermittently from 1993 until October 1997. Dr. Witkin is a private dentist who had a practice management agreement with respondent, Valley Forge Dental Associates, Inc. ("Valley Forge"), petitioner's direct employer.[1]

In 1996, petitioner began experiencing health problems. Already believing that he would test positive for the Human Immuno-deficiency Virus ("HIV") based on a letter he had received from the American Red Cross in 1986 after having donated blood, petitioner sought medical attention to assess the progression of his HIV disease. At that time, he confirmed that he was HIV positive, although he never told Dr. Witkin or anyone else at his practice about it. In September 1997, petitioner went to a different physician, again to assess the progression of his disease. Feeling compelled to inform petitioner's employer of petitioner's condition given the nature of his work, the physician called Dr. Witkin and told him of

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[1] Subsequent to Mr. Waddell's termination, Valley Forge Dental Associates was acquired by Monarch Dental Corporation, which exists today and is Valley Forge's successor-in-interest. Pet., App. at A2. For convenience, respondent is referred to herein as "Valley Forge."

petitioner's HIV positive status. Upon learning that petitioner was HIV positive, Dr. Witkin placed petitioner on a paid leave of absence for two weeks and began investigating how to deal with the situation. *See* Pet., App. at A3.

Dr. Witkin immediately sought guidance from public health authorities on both HIV and Acquired Immunodeficiency Syndrome ("AIDS"), and reviewed relevant literature from the Centers for Disease Control ("CDC"). *Id.* The CDC guidelines state that health care workers who perform "exposure prone procedures" pose a risk of transmitting the disease to patients despite the use of available precautions. *Id.*, App. at A24.

As a dental hygienist, it is undisputed that petitioner manipulated various sharp, pointed and bladed instruments with his hands within the mouths of his patients. Valley Forge presented uncontradicted evidence establishing that, given such a confined and poorly visible area, it is not uncommon for a hygienist to "stick" or cut himself or herself during the course of rendering treatment, nor is it uncommon for a dental hygienist to be bitten accidentally by a patient. *See* Pet., App. at A10-A13.[2] In fact, both Dr. Witkin and another hygienist, Jill Whelchel, testified that they have stuck or cut themselves while treating patients. *See id.* at A11. Moreover, two of the procedures performed by petitioner on nearly every

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[2] Even petitioner testified that he has cut himself while treating a patient, although fortunately for the patient, his hands were not in the patient's mouth at the time. Pet., App. at A11.

patient – "scaling" and "root planing" – pose a particularly high risk of injury to the dental hygienist and unavoidable bleeding to the patient.[3] *Id.* at A10.

Based on all of the information gathered by and presented to Dr. Witkin, including the CDC guidelines, his own personal experience working with hygienists and treating patients, and his knowledge of the essential functions performed by a dental hygienist in his practice, Dr. Witkin concluded that there was a distinct and realistic possibility that petitioner could infect one of his unsuspecting patients with HIV by sticking or cutting himself with a sharp instrument while performing invasive procedures in the patient's mouth. Having decided that permitting petitioner to continue treating patients in his practice presented a real and unacceptable risk of catastrophic proportion to his patients, Dr. Witkin met with petitioner and informed him that he could no longer treat patients. *Id.* at A3.

Because petitioner had been a good employee, Dr. Witkin offered to transfer petitioner to a non-clinical position. Petitioner declined that offer and subsequently brought this action, claiming that Valley Forge violated the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, the Rehabilitation Act, 28 U.S.C. § 791 *et seq.*, and

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[3] Scaling requires the dental hygienist to manipulate a sharp dental instrument along tooth surfaces and below the gumline to scrape away and remove plaque, calculus, tartar and other material or stains from the surfaces. Root planing involves the smoothing of the patient's root surfaces below the gumline, again with a sharp instrument. Pet., App. at A10.

several state laws by discriminating against him on the basis of a disability, HIV-positive status.

B. The Decisions Below

After discovery, the parties filed cross-motions for summary judgment. The United States District Court for the Northern District of Georgia granted summary judgment to Valley Forge, concluding that petitioner was not an "otherwise qualified employee" under the ADA.[4] The District Court reviewed the four factors set forth in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), to determine whether there was a significant risk, and therefore, a direct threat of harm: (1) the nature of the risk (how the disease is transmitted); (2) the duration of the risk (how long the carrier is infected); (3) the severity of the risk (what the potential harm is to third parties); and (4) the probability that the disease will be transmitted and will cause varying degrees of harm. The District Court concluded that petitioner posed a significant risk because the undisputed evidence confirmed that there was a chance that petitioner could cut himself while treating a patient and consequently bleed into a patient's open wound or mucous membrane, and HIV is a communicable disease transmittable in that fashion that

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[4] The District Court also dismissed petitioner's Rehabilitation Act claim because Valley Forge does not receive federal financial assistance, Pet., App. at A20, and his claim under 42 U.S.C. § 1981a because it does not provide an independent cause of action. Finally, the District Court declined to exercise supplemental jurisdiction over petitioner's state law claims.

inevitably causes death to the infected individual. Pet., App. at A26.

The Court of Appeals for the Eleventh Circuit affirmed, applying the *Arline* factors to the particular factual setting before it. Following its *en banc* decision in *Onishea v. Hopper*, 171 F.3d 1289 (11th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1114 (2000), the Eleventh Circuit explained that when transmitting a disease inevitably entails death, the probability of harm – *Arline*'s fourth factor – will be sufficient to establish a significant risk if the evidence shows both "(1) that a certain event can occur; and (2) that according to reliable medical opinion, the event can transmit the disease." *Id.* at 1299. It agreed with the District Court's analysis of the objective evidence indicating that petitioner, because he is infected with HIV, which is both contagious and fatal, was a direct threat to the patients he treated. The court found that "the uncontroverted evidence establishes that a dental worker sometimes does stick or cut herself during treatment," and "an inadvertent bite or some other accident during cleaning" could lead to exposure of petitioner's blood in a patient's cut or abrasion. Pet., App. at A11, A13. Moreover, the court relied on the fact that petitioner's medical experts did not dispute that transmission could occur from petitioner to one of his patients, with fatal consequences. *Id.* at A12. Looking at all of the "best available objective evidence," the court ruled in Valley Forge's favor. *Id.* at A13.

SUMMARY OF THE ARGUMENT

Petitioner has not presented any compelling reason for this Court to exercise jurisdiction over his appeal of the dismissal of his claim. As the District Court and the Eleventh Circuit properly found, the undisputed facts of this case demonstrate that there was a significant risk that petitioner would infect his patients with a fatal disease when he engaged in exposure-prone procedures that were an essential function of his position as a dental hygienist. Both lower courts reached this conclusion after carefully considering the "objective evidence" that was available to the decisionmaker as this Court instructed in *Bragdon v. Abbott*, 524 U.S. 624, 650 (1998), and the four factors for assessing the risk of exposure first articulated in this Court's decision in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).

Moreover, the District Court's and Eleventh Circuit's rulings in this case are consistent with decisions from every circuit court that has considered a case involving a health care worker infected with an inevitably fatal disease who engages in exposure-prone procedures in their profession. Finally, certiorari review of the question of which party bears the burden of proof on the prima facie case issue of direct threat under the ADA is inappropriate because petitioner failed to raise that issue in the District Court or the Court of Appeals.

Simply put, petitioner has not presented any compelling reason for this Court to exercise discretionary jurisdiction over his appeal of the dismissal of his claim. Accordingly, his petition for certiorari should be denied.

REASONS FOR DENYING THE WRIT

A. The Eleventh Circuit's Ruling Does Not Conflict with Controlling Decisions of this Court.

In a transparent attempt to grab this Court's attention, petitioner argues that the Eleventh Circuit's ruling is in "striking conflict" with this Court's decision in *Bragdon v. Abbott*, 524 U.S. 624. Pet. at 14. He also maintains that the Eleventh Circuit applied a standard for assessing what constitutes a "significant risk" of harm that is a "result-altering departure" from the standard for determining direct threat developed by this Court. Pet. at 15. However, petitioner mischaracterizes this Court's decision in *Bragdon* and distorts the Eleventh Circuit's holding in the hope of creating the false appearance of an issue worthy of this Court's consideration where none exists.

The ADA prohibits employers from discriminating against qualified individuals with a disability. 42 U.S.C. § 12101(a); *Bragdon*, 524 U.S. at 628. A qualified individual with a disability is one who can perform the essential functions of the job at issue, with or without reasonable accommodation. 42 U.S.C. § 12111(8). An individual is not "otherwise qualified" and thus cannot establish a prima facie case of discrimination under the ADA if he poses a direct threat to others. 42 U.S.C. § 12113(b). The ADA defines a "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services." *Id.* § 12111(3); *see also Bragdon*, 524 U.S. at 648-49.

In *Bragdon*, the plaintiff, Sydney Abbott, an HIV-positive patient, challenged her dentist's refusal to treat her in his office rather than in a hospital setting based on the defendant dentist's belief that she posed a direct threat of exposure to the HIV virus. The district court granted summary judgment to the plaintiff under the ADA and the First Circuit affirmed, finding that Abbott demonstrated as a matter of law that there was not a significant risk that she would infect her dentist during the course of treatment. This Court granted certiorari with respect to the direct threat provision of the ADA on a narrow issue:

> When deciding under Title III of the ADA whether a private health care provider must perform invasive procedures on an infectious patient in his office, should courts defer to the health care provider's professional judgment, as long as it is reasonable in light of then-current medical knowledge?

524 U.S. at 648.

After noting that the requirement of a "significant risk" was adopted in *Arline*, this Court held that "the existence, or nonexistence, of a significant risk must be determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must be based on medical or other objective evidence." *Id.* at 649. Thus, the challenged action must be evaluated "based on the objective, scientific information available" at the time the decision is made, and the dentist's unfounded belief that a significant risk existed

"even if maintained in good faith," would not relieve an individual or employer from liability.[5] *Id.*

Petitioner's assertions to the contrary, there is nothing about the Eleventh Circuit's analysis that conflicts with *Bragdon*. Simply put, this Court's decision in *Bragdon* did not address the issue presented by the facts of this case. Indeed, this Court did not discuss or apply the four factors articulated in *Arline*, much less consider the appropriate weight to be given to each factor where the severity of the harm, if inflicted upon an unsuspecting patient by a health care worker, is inevitable death. Rather, the Court considered the narrow question of whether, in assessing if a risk is "significant," courts must afford special deference to the health care provider's professional judgment. The Court's straightforward answer to that question, as described above, was "no." Even petitioner admits in his brief that "this Court did not address directly the level of weight to be afforded the 'probability' factor of the ADA standard in *Bragdon*. . . . " Pet. at 15. Thus, petitioner's argument that the Eleventh Circuit's decision is in "striking conflict" with *Bragdon* is defeated by his own admission.

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[5] This Court also addressed the question assumed in the question presented, *i.e.*, whether petitioner's refusal to treat his patient was reasonable in light of the medical evidence. After reviewing the evidence presented in support of Abbott's claim and questioning certain aspects of it, this Court remanded the matter to the First Circuit to determine, in the first instance, if the dentist presented sufficient "objective evidence" to defeat Abbott's motion for summary judgment on the direct threat issue. *Id.* at 650-55.

Apart from the fact that *Bragdon* did not address the issue presented here, there is another, perhaps more significant, reason why the result in this case is consistent with *Bragdon*. Indeed, petitioner overlooks the critical factual distinction that *Bragdon* involved a doctor explicitly refusing to treat a disabled person in his office rather than a hospital out of fear for his own health. In sharp contrast, this case involves an HIV positive health care worker performing exposure-prone procedures on thousands of unwitting patients. Unlike the dentist defendant in *Bragdon*, Dr. Witkin's concern was not for his own health, but for the safety of his unsuspecting adult and child patients who would be treated by petitioner and potentially exposed to a fatal infectious disease. As the First Circuit aptly observed in *Bragdon* itself, this factual distinction is "meaningful." *Abbott v. Bragdon*, 107 F.3d 934, 946, 947 (1st Cir. 1997), *vacated on other grounds*, 524 U.S. 624, *aff'd on remand*, 163 F.3d 87 (1st Cir. 1998).[6] And,

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[6] Further recognizing that the concerns raised by an HIV-positive health care worker treating an unsuspecting patient are appreciably different than those present in the converse situation, the First Circuit rejected the defendant's reliance on a CDC report indicating that a Florida dentist transmitted HIV to his patient. *Bragdon*, 107 F.3d at 947. The court found that the report was not probative of the risk posed to the defendant in treating the plaintiff, explaining:

> Dentists have the advantage of equipping and staffing their offices and dictating the precautionary procedures that will be utilized during patient encounters. In contrast, patients have no way of assuring that any particular risk-reduction measures, much less universal precautions recommended by the CDC, are introduced. Given that dentists are in a superior position to patients in terms of protecting

unlike the dentist in *Bragdon* who presented no objective medical evidence to support his self-serving position that treating the plaintiff in the hospital would reduce the possibility of transmission to him, Dr. Witkin's decision was based on objective medical evidence and the opinion of public health authorities establishing that petitioner's performance of exposure-prone procedures presented a real risk of transmission to his patients.

Petitioner nevertheless blatantly mischaracterizes the Eleventh Circuit's holding as "a result-altering departure from the standard for determining direct threat developed by this Court" because the court supposedly adopted a standard that "*any* risk of death greater than absolute zero constitutes a direct threat." Pet. at 14-15 (emphasis added). He contends that the Eleventh Circuit's analysis effectively eliminates consideration of the fourth factor in *Arline* – the probability of harm – when the harm, if inflicted, is inevitable death. He boldly characterizes the lower court's decision as holding that "any theoretically supportable theory of HIV transmission will support a direct threat finding . . . no matter how miniscule the chance that transmission will actually occur." Pet. at 12. Petitioner's characterization of the Eleventh Circuit's holding and rationale is nonsensical.

As argued above, in evaluating the fourth *Arline* factor and ultimately concluding that petitioner posed a

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> against infection, a single report of dentist-to-patient infection cannot reasonably be taken to suggest a direct threat to dentists from their patients' infections.

Id.

"significant risk" to his patients, the Eleventh Circuit applied the standard set forth in its previous *en banc* decision in *Onishea v. Hopper*, 171 F.3d 1289 (11th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1114 (2000). There, the court elaborated on the four-part *Arline* analysis in a case involving the possible transmission of HIV in prisons. The court reasoned that "the significance of a risk is a product of the odds that transmission will occur and the severity of the consequences." *Id.* at 1297. Indeed, "it is the potential gravity of the harm that imbues certain odds of an event with significance." *Id.* The court held that "when the adverse event is the contraction of a fatal disease, the risk of transmission can be significant even if the probability of transmission is low: death itself makes the risk significant." *Id.*

Importantly, and in direct conflict with petitioner's unfounded assertions about the nature of the Eleventh Circuit's holding in the instant case, *see* Pet. at 14, the *Onishea* court explicitly rejected an "any risk" standard that would completely eliminate an analysis of the probability that HIV exposure could occur. The court specifically stated: "This is not an 'any risk' standard: the asserted danger of transfer must be rooted in sound medical opinion and not be speculative or fanciful." *Onishea*, 171 F.3d at 1299. The court pointed out that "saying a risk of an event is small does not mean it will not happen." *Id.* The court determined that even a small risk would be significant to a person infected with a fatal disease, noting that "each time the event occurs, it is real people – not cold ciphers – that suffer the consequences." *Id.*

Petitioner conveniently overlooks those portions of *Onishea* and the lower court's decision in this case that confirm that the Eleventh Circuit's standard is not an "any risk" standard. The Eleventh Circuit's decision in this case did not, as petitioner suggests, remove the fourth factor of *Arline* from the analysis simply because the harm at issue is inevitable death and did not hold that any risk of death greater than "absolute zero" constitutes a direct threat. Rather, the Eleventh Circuit's decision simply recognized, as does petitioner himself, that the *Arline* factors require "[p]roper balancing," Pet. at 14, depending on the factual circumstances, and the "likelihood sufficient to establish a direct threat that a harm will occur will become smaller in inverse proportion to the seriousness of the harm that is risked." *Id.* Again, by his own admission, petitioner recognizes the validity of the Eleventh Circuit's approach in this case.

At bottom, petitioner's entire argument centers around his assertion that the Eleventh Circuit's decision is a radical departure from this Court's precedent. In reality, however, the lower court's decision is nothing more than a straightforward application of the four factors articulated in *Arline* to the facts of the particular case before it. Because there was no real dispute between the parties with respect to the first three *Arline* factors – nature of the risk (how the disease is contracted), duration of the risk (petitioner is infected for the remainder of his life), and severity of the risk (inevitable death of the patient) – the Eleventh Circuit focused on the last factor, which is the probability of transmission of HIV between petitioner and a patient. Pet., App. at A9. In assessing the probability of transmission, the court recognized that the

significance of each factor must be assessed, and may vary, in light of the unique facts of each case, explaining that "[w]hen the adverse event is the contraction of a fatal disease, the risk of transmission can be significant even if the probability of transmission is low. . . ." Pet., App. at A7. Given *Bragdon*'s admonition to assess the risk of infection based on " 'objective scientific information,' " *id.* (quoting *Bragdon*, 524 U.S. at 649) and other "available objective evidence," *Bragdon*, 524 U.S. at 649, the Eleventh Circuit emphasized that the possibility of transmission must not be "speculative or fanciful." Rather, the evidence that must be "rooted in sound medical judgment," Pet., App. at A7, which is hardly a departure from or inconsistent with *Arline* and *Bragdon*.

After reviewing all of the objective evidence before it, including the CDC guidelines, petitioner's medical experts' testimony that a hygienist's fingers and sharp instruments are simultaneously in the patient's mouth during at least some of the treatment process, testimony confirming that patients' mouths frequently bleed during routine treatment, and proof that cuts and abrasions to the hygienist's fingers have occurred in the past, the court found that the risk of transmission was not "speculative." Rather, the risk of transmission was "significant" because the proofs confirmed that exposure could occur and that catastrophic consequences would result if even one patient were infected. Thus, consistent with *Bragdon*, the lower court examined the "medical or other objective evidence," 524 U.S. at 649, and consistent with *Arline*, conducted an "individualized inquiry." 480 U.S. at 287 (stating that "such an inquiry is essential if [the Act]

is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns as avoiding exposing others to significant health and safety risks").

Ignoring the fact-specific and limited nature of the Eleventh Circuit's holding and the uniqueness of the situation that his case presented, petitioner envisions a "host of imaginable disasters," Pet. at 16, that will flow from the court's decision that effectively will prevent any disabled person from holding a job. For example, petitioner claims that the lower court's ruling will prevent an HIV-positive applicant from attaining an office position, an HIV-positive teacher from remaining in the classroom, a firefighter with hepatitis C from fighting fires, and a wheelchair bound individual from managing a day-care center.

Simply put, petitioner is comparing apples to oranges; consistent with his position throughout this litigation, he simply refuses to confront the fact that the threat that he poses to his innocent patients is radically different – and more serious – than the hypotheticals he proposes. Indeed, none of these scenarios involves the same level of risk of certain death that petitioner posed to the thousands of unsuspecting patients – adults and children[7] – on whom he performed exposure-prone

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[7] As the Fifth Circuit noted in *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758, 764 (5th Cir. 1996), "[t]hat any potential harm will befall children, the most vulnerable members of our society, will greatly impact the consideration of [t]he nature and severity of the potential harm." *Id.* (internal quotation marks omitted).

procedures on a daily basis. Unlike the case before the Court, in none of petitioner's fantasy scenarios is there CDC guidance identifying a "recognized risk" of exposure. It defies common sense to suggest that an office worker or teacher with HIV engages in everyday tasks that pose the same degree of risk of infection and death as an HIV-positive dental hygienist working with sharp instruments in invariably bleeding mouths of thousands of patients annually.

Petitioner also fails to recognize that his firefighter and day-care worker analogies are flawed because neither presents a situation where the harm that follows, should a particular event occur, is *certain* death to a third party. Again, petitioner's alarmist arguments are a transparent attempt to convince the Court that the holding below will lead to absurd results, when it plainly will not.

B. There is No Disagreement Among the Courts of Appeals Concerning the Proper Application of the Four Factors from *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), in Cases Involving Health Care Workers Infected with an Inevitably Fatal Disease.

In addition to suggesting that the Eleventh Circuit's ruling conflicts with Supreme Court precedent, petitioner argues that there is a larger disagreement among the Courts of Appeals concerning the application of *Arline*'s four factor test when the harm at issue has "potentially fatal consequences." *See* Pet. at 18. Once again, petitioner's attempt to create an issue worthy of this Court's consideration is unsuccessful.

Petitioner's attempt to manufacture a circuit split misses the mark because his argument begins from a faulty premise – namely, that this case involves a risk of "potentially fatal consequences" similar to the cases on which he relies. What he apparently fails to appreciate is that this case is not about the *possibility* that a person could die from exposure to petitioner's fatal disease; rather, it is about *certain* death to a third party in the event of exposure and how that stark reality necessarily impacts the overall fact-specific significant risk analysis contemplated in *Arline*.

There is no "larger disagreement" among the Courts of Appeals concerning the application of the *Arline* test in a situation such as that presented here, where the potential risk to third parties, if a certain event occurs, is inevitable death. While petitioner cites several irrelevant cases in the hopes of creating the illusion of a circuit split where there is none, petitioner conveniently overlooks those cases that have addressed the direct threat issue in factually analogous circumstances. Indeed, petitioner failed to mention the fact that *every* circuit court that has considered a case involving an HIV-positive health care worker who performs exposure-prone procedures has reached the same conclusion as the Eleventh Circuit.

In concluding in each case that the plaintiff health care worker posed a significant risk to patients, the Courts of Appeals for the Fourth, Fifth and Sixth Circuits evaluated the severity of the harm and evidence concerning the likelihood of transmission and determined that the inevitably fatal nature of the HIV virus rendered the odds of transmission significant under *Arline*. The courts recognized that the fact-intensive nature of the analysis

under *Arline* and the severity of the harm at issue necessarily impacted the overall inquiry. *See Estate of Mauro v. Borgess Med. Ctr.*, 137 F.3d 398, 407 (6th Cir. 1998) (concluding that surgical technician was a direct threat to patients, where employer considered same CDC guidelines as Valley Forge and determined that plaintiff engaged in exposure-prone procedures; court relied on description of job responsibilities, the fact that plaintiff sustained a needle laceration in the past and the "uncontradicted fact that a wound causing an HIV-infected surgical technician to bleed while in the body cavity could have catastrophic results"); *Doe v. Univ. of Maryland Med. Sys. Corp.*, 50 F.3d 1261, 1266 (4th Cir. 1995) (finding that HIV-positive neurosurgery resident posed significant risk to patients because he engaged in exposure-prone procedures; court rejected plaintiff's argument that the risk that he would transmit HIV to one of his patients was so infinitesimal that it could not be considered a significant risk, regardless of the degree of harm involved, stating that "some measure of risk will always exist because of the type of activities in which [the physician] is engaged"); *Bradley v. Univ. of Texas*, 3 F.3d 922, 924 (5th Cir. 1993) (finding that surgical technician was not "otherwise qualified" where evidence showed that plaintiff frequently handled sharp instruments near open wounds and body cavity, his hands were in body cavity and he admitted that accidents occurred; court noted that "while the risk [of transmission] is small, it is not so low as to nullify the catastrophic consequences of an accident").[8]

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[8] Other cases, not arising in the health care context, nevertheless recognize the import of the fact that HIV exposure

Moreover, at least two district courts have reached the same conclusion in factually analogous circumstances. *See Scoles v. Mercy Health Corp.*, 887 F. Supp. 765, 770 (E.D. Pa. 1994) (granting summary judgment against HIV-positive orthopedic surgeon: "Since the risk will endure as long as [the plaintiff] performs surgery and the harm is a fatal disease, [p]laintiff does not convince the court that he is not a 'direct threat' and entitled to judgment as a matter of law."); *Doe v. Washington Univ.*, 780 F. Supp. 628, 633-34 (E.D. Mo. 1991) (granting summary judgment against HIV-positive dental student: "To permit even an occasional death to occur because of a failure to scrupulously guard the safety of patients would appear to be morally unacceptable and contrary to the fiduciary responsibilities of the medical profession. While doctors emphasize the danger, statistically, is slight, the victim of infection by this rare but fatal infection can hardly be consoled by the odds.").

Rather than focusing on these factually analogous cases, petitioner attempts to distract the Court by continuing to state incorrectly that the Eleventh Circuit adopted an "any risk" standard that would permit any possibility of transmission, regardless of how remote or speculative, to constitute a "significant risk." Pet. at 18.

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results in inevitable death. *See, e.g., Onishea*, 171 F.3d at 1297 (explaining that "the potential gravity of the harm . . . imbues certain odds of an event with significance;" "we are far more likely to consider walking a tightrope to pose a significant risk if the rope is fifty feet high than if it is one foot off the ground."); *Montalvo v. Radcliffe*, 167 F.3d 873, 878 (4th Cir. 1999) (noting that "the gravity of one factor might well compensate for the relative slightness of another").

And, as set forth above, he ignores the factually analogous cases and cites a number of inapposite cases in an attempt to create a circuit split where there is none. Specifically, petitioner claims that decisions from the Eleventh and Fourth Circuits are inconsistent with decisions in the First, Fifth, Sixth and Ninth Circuits concerning the weight to be afforded to the last *Arline* factor – the probability of harm. He characterizes the Eleventh and Fourth Circuits as having ruled that, where the risk at issue is exposure to a deadly disease, "any risk of death" is significant, regardless of how remote or speculative the possibility is that it will occur, while the First, Fifth, Sixth and Ninth Circuits have declined to find that the risk of death is significant if the probability that it will occur is small. Pet. at 18-22 (citing *Hamlin v. Charter Township of Flint*, 165 F.3d 426 (6th Cir. 1999); *Abbott v. Bragdon*, 163 F.3d 87 (1st Cir. 1998); *Rizzo v. Children's World Learning Ctrs.*, 84 F.3d 758 (5th Cir. 1996); *Chalk v. United States District Court*, 840 F.2d 701 (9th Cir. 1988)). His arguments miss the mark.

First, as previously stated, the Eleventh Circuit's opinion in *Onishea* explicitly rejected the "any risk" standard that petitioner urges it adopted. The Eleventh Circuit stated that the danger of transmission must be "rooted in sound medical opinion and not be speculative or fanciful."[9] *Onishea*, 171 F.3d at 1299.

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[9] Similarly, petitioner improperly characterized the Fourth Circuit's decision in *Montalvo* as having adopted an "any risk" of death standard. In *Montalvo*, the court considered the probability of a child transmitting the HIV virus in a karate class in which the participants often sustained bloody injuries and engaged in body contact. Relying on evidence confirming those

Second, while it is true that certain of the cases petitioner cites reached different results in addressing the direct threat issue, each is factually distinguishable from the present case. In any event, the analysis in all of the cases is the same; each court applied the four factors in *Arline* and assessed each factor based on the circumstances presented. Thus, rather than demonstrating that a circuit split exists, the divergent results actually underscore the reality that the four-factor analysis from *Arline* mandates an "individualized inquiry" into the facts of each case. 480 U.S. at 287.

For example, petitioner conveniently fails to point out that *Rizzo* and *Hamlin* are factually distinguishable because they did not involve situations where the nature and severity of harm, if it occurred, was certain death to an innocent third party. In *Rizzo*, the Fifth Circuit addressed a claim by a hearing impaired employee who was prohibited from driving a school van with children because she might not be able to hear a child choking in the back of the van.[10] 84 F.3d at 760-61. *Hamlin* involved

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facts, the court found that it was sufficient to create a significant risk under *Arline*. 167 F.3d at 878. Similar to the Eleventh Circuit's analysis in *Onishea*, the *Montalvo* court noted that "when the disease at risk of transmission is, like AIDS, severe and inevitably fatal, even a low probability of transmission could still create a significant risk." *Id.*

[10] Petitioner also mischaracterizes the holding in *Rizzo*. In *Rizzo*, the court did not, as petitioner suggests, remand the case to the district court to consider whether the harm in question was "*significantly* likely to occur." Pet. at 21. Rather, the court simply held that there was a genuine issue of material fact as to whether a hearing impaired individual posed a direct threat to school children by driving a school van. *Rizzo*, 84 F.3d at 764.

an assistant fire chief who was terminated because of a medical restriction on his ability to engage in front-line firefighting, despite the fact that participation in active firefighting was not an essential function of the position of assistant fire chief. 165 F.3d at 432. While both cases presented a remote risk that an event could occur that could cause injury or death to a third party, death was not necessarily an inevitable consequence of the risk that each plaintiff's disability posed. Moreover, and perhaps more importantly, neither case involved an HIV-positive health care worker performing exposure-prone procedures on unsuspecting third parties, including children.

Petitioner also inexplicably relies on the Ninth Circuit's decision in *Chalk*, where a teacher was relieved of his classroom duties because he suffered from AIDS. The district court denied the teacher's motion for a preliminary injunction based on the opinion of one doctor who opined that AIDS could be contracted through casual contact. The Ninth Circuit reversed that determination because the "overwhelming consensus" of medical opinion confirmed that AIDS could only be transmitted in limited ways and not through casual contact. 840 F.2d at 707-08. While petitioner seizes upon the Ninth Circuit's statement that "it was error to require that every theoretical possibility for harm be disproved," *id.* at 709, the court made that statement in the context of rejecting the district court's reliance on the possibility of casual transmission of the disease where the scientific evidence showed otherwise. *See id.*

Here, the risk of transmission in connection with petitioner's performance of his job is "recognized" by the CDC. In any event, the activities that occur in a classroom

setting are appreciably different than the exposure-prone procedures that petitioner performed on a daily basis.

And, despite petitioner's continued reference to *Bragdon*, that case also is inapposite because, as previously explained, it involved a dentist refusing treatment to an HIV positive patient – the converse of the situation presented here. Notably, in arguing that his patient posed a direct threat to his safety, the dentist in *Bragdon* relied on the cases cited above addressing whether an HIV-positive health care worker posed a direct threat to patients. The original panel of the First Circuit rejected this attempted analogy, correctly recognizing that "the federal cases involving transmission of HIV from health-care workers to patients are inapposite." 107 F.3d at 948. This part of the First Circuit's analysis was not disturbed by this Court or the First Circuit on remand. Thus, petitioner's citation to *Bragdon* in the hopes of demonstrating that the First Circuit would have reached a different result in this case is unavailing.

Based on the foregoing, petitioner's unfounded concern that "the same plaintiff with the same facts can expect very different results depending on the circuit" is easily put to rest. Pet. at 22. Rather than conflicting with the relevant case law on this issue, the Eleventh Circuit's ruling is consistent with the cases on point. The purported conflict raised by petitioner does not exist, and review by this Court is unnecessary.

C. Certiorari on the Question of the Proper Allocation of the Burden of Proof Is Not Appropriate Because the Issue Is Being Raised for the First Time in the Petition for Certiorari.

Finally, petitioner urges this Court to grant certiorari on the question of which party should bear the burden of proof on the existence of a direct threat under the ADA. Pet. at 22. Petitioner claims that there is a split among the circuits concerning which party must establish the presence or absence of a direct threat. Pet. at 23. However, certiorari on this question is not appropriate because petitioner has waived that argument by not raising any challenge relating to the burden of proof in the proceedings below.[11]

Conspicuously absent from petitioner's short discussion of this issue in his petition is any citation to the record below where he presented an argument concerning the proper allocation of the burden of proof on the issue of direct threat under the ADA. The reason for the lack of citation to the record is because petitioner never made any such argument, or objected to the court's

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[11] Contrary to petitioner's assertion, review also is inappropriate because there is no significant divergence of opinion on this issue. Indeed, many of the cases petitioner cites placed the burden on one party without specifically addressing the issue. *E.g., LaChance v. Duffy's Drafthouse, Inc.*, 146 F.3d 832, 836 (11th Cir. 1998); *Den Hartog v. Wasach Acad.*, 129 F.3d 1076, 1089 (10th Cir. 1997); *EEOC v. AIC Sec. Invest.*, 55 F.3d 1276, 1284 (7th Cir. 1995). One court limited its holding to the facts, *e.g., EEOC v. Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997), and one court declined to reach the issue. *E.g., Stafne v. Unicare Homes*, 266 F.3d 771, 775 (8th Cir. 2001).

placement of the burden, before the District Court or the Court of Appeals. Moreover, the lower courts never considered the issue because it was not briefed or argued. Notably, the Equal Employment Opportunity Commission ("EEOC"), in its amicus brief before the Eleventh Circuit, conceded that petitioner had the burden of proving that he did not constitute a direct threat to his patients. *See* Resp. App. at 2 (EEOC Br. at 20 ("This Court has ruled that the plaintiff has the burden of proving he does not pose a direct threat. *LaChance v. Duffy's Drafthouse, Inc.*, 146 F.3d 832, 836 (11th Cir. 1998).")). The placement of the burden of proof simply was not an issue until this point in the proceedings.

In his briefs before the Eleventh Circuit and at oral argument, petitioner did not contend that the District Court misapplied the burden of proof or that the Eleventh Circuit's previous decision in *LaChance* was incorrect. Because petitioner failed to preserve his claim concerning the proper allocation of the burden of proof before the District Court or the Court of Appeals and because neither court has considered the question, this Court should deny petitioner's eleventh-hour attempt to raise the issue. *See Glover v. United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below"); *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999) (dismissing writ as improvidently granted and declining to reach argument "neither raised nor considered below"); *Auer v. Robbins*, 519 U.S. 452, 464 (1997) (stating that it would not consider argument that was inadequately preserved in prior proceedings); *City of Springfield v. Kibbe*, 480 U.S. 257, 259-60 (1987) (declining

to decide issue where petitioner did not properly preserve argument in District Court or make argument in Court of Appeals, Court of Appeals did not address the issue and respondent objected to Supreme Court's consideration of issue in opposition brief); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (declining to consider argument that Court should overrule prior precedent and permit claim where petitioner never raised issue in the Court of Appeals).

Moreover, in the present case, there are no "unusual circumstances" that would warrant disregarding this general rule, which "maintain[s] the integrity of the process of certiorari." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992); *cf. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1984) (Court ordered parties to brief issue raised in amicus brief and considered issue on the merits where "the conflict between Oklahoma and federal law was plainly raised in petitioner's complaint, it was acknowledged by both the District Court and the Court of Appeals, the District Court made findings on all factual issues necessary to resolve this question, and the parties briefed and argued the question"); *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (holding that "interests of judicial administration" allowed Court to consider question presented for the first time in petition for certiorari where respondent did not object to the Court's consideration of it, the issue was squarely presented and fully briefed, it was "an important, recurring issue," and it was properly raised in another petition for certiorari that was held pending disposition of case).

Finally, putting aside the fact that petitioner failed to preserve the issue for appellate review, there is an

additional reason why this Court should not grant certiorari on petitioner's contention that the Eleventh Circuit improperly placed the burden of proof on petitioner. Simply put, the lower courts' decisions did not turn upon which party had the burden of proof on the direct threat issue. Indeed, both the District Court and the Court of Appeals considered all of the evidence presented by both parties and evaluated petitioner's claim based upon its totality. Accordingly, this case raises no significant issue concerning who should bear the burden of proof, and review should be denied.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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April 25, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-14896-A

SPENCER WADDELL,

Plaintiff-Appellant,

v.

VALLEY FORGE DENTAL ASSOCIATES, INC., and JOHN DOE, as successor-in-interest of VALLEY FORGE DENTAL ASSOCIATES, INC.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT SPENCER WADDELL

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* * *

he is qualified, a person must show that he has the requisite skill, licenses, employment experience and educational background, and that he can perform the job with or without a reasonable accommodation. 29 C.F.R. § 1630.2(m).

A disabled individual is not otherwise qualified, however, if he presents a direct threat to his own or others' safety. To establish that a disabled person is a "direct threat," it must be shown that the employee's disability presents "a significant risk of substantial harm- . . . that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r); *See also Bragdon*, 524 U.S. at 648(ADA); *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 287 n.16 (1987) (Rehabilitation Act). This Court has ruled that the plaintiff has the burden of proving he does not pose a direct threat. *LaChance v. Duffy's Drafthouse, Inc.*, 146 F.3d 832, 836 (11th Cir. 1998).

Direct threat determinations must be based on an individualized assessment of the person's present ability to safely perform the essential functions of the job, considering a reasonable medical judgment relying on the most current medical knowledge and/or best available objective evidence. 29 C.F.R. § 1630.2(r). In a case involving contagious disease, this inquiry must include (a) the nature of the risk, (b) the duration of the risk, (c) the severity of the risk, and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm. *Arline*, 480 U.S.

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